United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 19, 2007

TO : Martha Kinard, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 657
Case 16-CB-7407

536-2545-0000
536-2545-0600
536-2581-0180-5000

The Region submitted this case for advice as to whether, in connection with the operation of its exclusive hiring hall, Teamsters Local 657 (the Union) breached its duty of fair representation in violation of Section 8(b)(1)(A) by: (1) refusing to file a grievance regarding the production companies' (Employers) refusal to employ the Charging Party [*FOIA Exemptions 6 and 7(C)*]; and/or (2) failing to adequately monitor and grieve Employer departures from the hiring hall referral procedures.

We conclude that the Union has not violated Section 8(b)(1)(A) in its investigation and refusal to file a grievance relating to the production companies' refusal to employ [*FOIA Exemptions 6 and 7(C).*] We further conclude that the Union's ineptitude in dealing with the Employers' departure from the exclusive hiring hall referral rules did not constitute "gross negligence," and did not violate its duty of fair representation.

FACTS

The Union maintains an exclusive hiring hall that provides drivers to movie production companies filming in the central Texas area. The hiring hall operates on a rotational "first-in, first-out" basis. In connection with the operation of its hiring hall, the Union enters into contracts, known as Standard Area Agreements (SAAs), with production companies when a production begins. Each Standard Area Agreement includes Article IV, which governs the employment of drivers from the Union, and provides in relevant part:

> (b) the Producer agrees to request referrals for all drivers required for work covered by the Agreement from the Union. This provision is subject to the following conditions: (i) Chauffeurs and Trucker

> Drivers will be referred to the Producer from the Union on a non-discriminatory and lawful basis, and such referrals will in no way be affected by Union membership or any aspect thereof. (ii) The Producer retains the right to reject any applicant referred from the Union. (emphasis added)

In addition to the preceding, the referral rules permit the producer to specifically request 10% of the drivers; however, the Union must receive the request in writing.

When a production begins, the production company retains a transportation coordinator who serves as a liaison with the Union. The transportation coordinator is responsible for the transportation department and is usually the person who contacts the hiring hall to obtain drivers and makes hiring decisions. When a transportation coordinator contacts the Union to request referrals, Teamsters Business Agent Paul Cruz faxes a list of the names of hiring hall registrants listed in the numbered order that their names appear on the out of work list (i.e. "first-in, first-out"). According to the SAA, the transportation coordinator should then utilize the list to contact hiring hall registrants directly to offer them employment. The Union does not require that the Employers notify it of employment offers. Cruz relies upon the hiring hall registrants to notify him if they have not been hired and remain out of work.

The Union admits that it was aware that [*FOIA Exemptions 6 and 7(C)*] on multiple productions had asked drivers for employee references and had directly hired non-referred, non-union drivers. Specifically, Cruz admits that [*FOIA Exemptions 6 and 7(C)*] and other members gave him names of drivers on each production crew whom the Employers had directly hired.

Cruz investigated this issue by calling [*FOIA Exemptions 6 and 7(C)*] on each production and reminding them that if they needed drivers, they should contact him for a new referral list. Cruz also requested and received a copy of the list of drivers that *Friday Night Lights* had employed and found that many were non-referrals. Cruz told *FOIA Exemptions 6 and 7(C)*] of *Friday Night Lights*, and other *[FOIA Exemptions 6 and 7(C)*], that their hiring actions violated the SAA. [*FOIA Exemptions 6 and 7(C)*] responded by asserting that she could do nothing to remedy the situation because Texas is a "Right to Work" state and, therefore, she could not lawfully terminate those employees hired outside of the referral list. The Union accepted this "Right to Work" argument and ceased efforts to remedy the breach of the exclusive hiring hall rules.

On July 21, 2006, [*FOIA Exemptions 6 and 7(C)*] made a written request that Cruz conduct an investigation into the specific reasons that [*FOIA Exemptions 6 and 7(C)*] had not been hired on the production of *Comanche Moon*, *Stop* Loss and *Friday Night Lights*. Cruz directly contacted, either in-person or by phone, each [*FOIA Exemptions 6 and 7(C)*], requesting an explanation for their refusals to hire [*FOIA Exemptions 6 and 7(C).*] Each [*FOIA Exemptions 6 and 7(C)*] admitted that [*FOIA Exemptions 6 and 7(C)*] name was at or near the top of each referral list he or she had received from the hiring hall, but presented reasons for refusing to hire [*FOIA Exemptions 6 and 7(C).*]

[*FOIA Exemptions 6 and 7(C)*] of *Comanche Moon* [*FOIA Exemptions 6 and 7(C)*] stated that he had not hired [*FOIA Exemptions 6 and 7(C)*] because [*FOIA Exemptions 6 and 7(C)*] had "threatened to physically harm him" on an earlier production. [*FOIA Exemptions 6 and 7(C)*] of *Stop Loss* [*FOIA Exemptions 6 and 7(C)*] stated that he had not hired [*FOIA Exemptions 6 and 7(C)*] because (1) on another job, [*FOIA Exemptions 6 and 7(C)*] had argued with him about increasing the time allotted for each driver to chauffeur actors from a hotel to the set, (2) [*FOIA Exemptions 6 and 7(C)*] had demanded that Union members be allowed to pick up rental equipment from New Mexico and deliver it to Austin, even though the production company had already arranged for free delivery and (3) he was aware of [*FOIA Exemptions 6 and 7(C)*] threat to physically harm [*FOIA Exemptions 6 and 7(C)*] in a previous production. [*FOIA Exemptions 6 and 7(C)*] of *Friday Night Lights* [*FOIA Exemptions 6 and 7(C)*] stated that she had not hired [*FOIA Exemptions 6 and 7(C)*] because of his reputation for arguing on set with production employees and coordinators and because he had damaged rental equipment in a previous production.

Cruz and Union President Frank Perkins decided that the Employers' assertions were credible. Accordingly, on September 7, 2006, Cruz sent [*FOIA Exemptions 6 and 7(C)*] a letter summarizing the results of the Union's investigation and notifying [*FOIA Exemptions 6 and 7(C)*] that the Union would not file a grievance or take any further action in this matter. The Union did not give [*FOIA Exemptions 6 and 7(C)*] the opportunity to explain or rebut the Employers' assertions. However, [*FOIA Exemptions 6 and 7(C)*] has now conceded the truth of most of the Employers' assertions, including that he physically threatened [*FOIA Exemptions 6 and 7(C)*] on an earlier production.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(A) in its investigation and refusal to file a grievance relating to the Employers' refusal to employ [*FOIA Exemptions 6 and 7(C).*] We further conclude that, although the Union acted ineptly and negligently in response to the Employers' departures from the exclusive hiring hall referral rules, that did not constitute gross negligence violative of its duty of fair representation. Therefore, the instant charges should be dismissed, absent withdrawal.

Refusal to File a Grievance on Behalf of [*FOIA Exemptions 6 and 7(C)*]

In determining whether a union has breached its duty of fair representation in processing a grievance, the Board examines the totality of the circumstances to determine whether the union's conduct was based upon arbitrary, irrelevant, discriminatory, or invidious considerations.[1] One example of arbitrary conduct is a union's perfunctory determination, without investigation, that a grievance will not be pursued.[2]

Here, we conclude that the Union did not engage in perfunctory, or otherwise arbitrary, grievance processing. Although the Union contacted only the Employers and, based on their assertions, informed [*FOIA Exemptions 6 and 7(C)*] that the Union did not believe his allegations warranted further action, this constituted an adequate investigation under the circumstances. Thus, the Employers' contractually unrestricted right to refuse hiring hall

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[1] Office Employees Local 2, 268 NLRB 1353, 1355-1356 (1984), affd. sub nom. Eichelberger v. NLRB, 765 F.2d 851 (9th Cir. 1985).

[2] Brown Transport Corp., 239 NLRB 711, 714 (1978). With regard to an employee's discharge, the Board has held that, as part of its investigation, a union must do more than obtain the employer's version of the events. See, Newport News Shipbuilding & Dry Dock, 236 NLRB 1470, 1471 (1978), enfd. in part, denied in part, 631 F.2d 263 (1980) (union engaged in unlawful perfunctory grievance processing when it relied almost solely upon the employer's explanation with little additional investigation); P&L Cedar Products, 224 NLRB 244, 260 (1976) (failure to discuss case with grievant and unquestioned acceptance of employer version was unlawful).

referrals permitted them to refuse to hire [*FOIA Exemptions 6 and 7(C)*], and the Union would not be able to prevail if it pursued a grievance. Unlike in the discharge cases discussed above,[3] the refusals to hire [*FOIA Exemptions 6 and 7(C)*] were not subject to a "just cause" standard that required the unions in those cases to conduct further investigations to establish whether the grievances had merit.

Union's Failure to Challenge Employers' Departure from Hiring Hall Referral Rules

A union owes a duty of fair representation to all hiring hall applicants[4] and may not act arbitrarily, discriminatorily or in bad faith when operating a hiring hall.[5] A union violates its duty of fair representation if, in light of the factual and legal landscape at the time of its actions, its conduct is so far outside a wide range of reasonableness as to be irrational.[6] Mere negligence, ineptitude or poor judgment, standing alone, is insufficient to establish a breach of the union's duty of fair representation.[7]

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[3] See footnote 2.

[4] See, Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67, 73 (1989).

[5] Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Board has held that the same duty of fair representation standard applies to all union activities, including operation of a hiring hall. See, Contra Costa Electric Inc., 329 NLRB 688 (1999), rev'd by Jacoby v. NLRB, 233 F.3d 611 (D.C. Cir. 2000), remanded to 336 NLRB No. 44 (2001), petition for review denied by 325 F.3d 301 (D.C. Cir. 2003).

[6] Air Line Pilots v. O'Neill, 499 U.S. 65, 67 (1991), quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[7] Teamsters Local 692 (Great Western Unifreight System), 209 NLRB 446, 448 (1974).

In Contra Costa Electric Inc.[8] the D.C. Circuit held that a union owes a "heightened duty" of fair dealing toward employees in the hiring hall context.[9] There, the union hiring hall dispatcher negligently referred several lower-priority hiring hall registrants ahead of the charging party.[10] Applying the "wide range of reasonableness" standard, the Board found the union's negligent action did not violate Section 8(b)(1)(A). On appeal, the D.C. Circuit reversed and held that a "heightened duty" should apply in the hiring hall context, which requires that unions act in compliance with objective criteria.[11] The D.C. Circuit remanded the case to the Board to determine if under a heightened standard the union's negligent action violated Section 8(b)(1)(A). On remand, although the Board accepted the D.C. Circuit's opinion as "law of the case," it held that, even under a heightened duty standard, the union's mere negligence did not constitute a breach of its duty of fair representation.[12]

On the other hand, the Board and courts have stated that "gross" negligence may violate the duty of fair representation.[13] For example, the Sixth Circuit found that a union breached its duty of fair representation by its gross negligence in handling a grievance, where it failed to rely on clear contract provisions having a direct bearing on the case.[14] However, the Board rarely finds

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[8] Jacoby v. NLRB, 233 F.3d 611, reversing and remanding 329 NLRB 688 (1999).

[9] Id. at 615-617.

[10] Contra Costa, 329 NLRB at 691.

[11] Jacoby v. NLRB, 233 F.3d at 617.

[12] 336 NLRB at 550. The D.C. Circuit denied a petition for review of this decision and accepted the Board's analysis. 325 F.3d at 301. The Board has not adopted the heightened duty standard in subsequent hiring hall cases. See, Teamsters Local 631 (Vosburg Equipment, Inc.), 340 NLRB 88, n. 4 (2003).

[13] Vaca v. Sipes, 386 U.S. 171, 190 (1967); Contra Costa, 336 NLRB at 552, n.9.

[14] Milstead v. Int'l Brotherhood of Teamsters, Local 957, 580 F.2d 232, 235 (6th Cir. 1978), affirming unpublished

"gross negligence" and it has been expressly recognized that ignorance of the law does not constitute gross negligence.[15]

Here, the Union had knowledge that the Employers were departing from the exclusive hiring hall referral rules by directly hiring drivers. Cruz confronted [*FOIA Exemptions 6 and 7(C)*] about direct hiring and warned them that they were bound by the SAA's exclusive hiring rules. However, Cruz never sought to enforce the agreement because he accepted [*FOIA Exemptions 6 and 7(C)*] assertion that, since Texas is a "Right-to-Work" state, it would be unlawful to discharge the current non-union employees in order to employ Union hiring hall referrals.

The Union's decision to stay its hand in response to [*FOIA Exemptions 6 and 7(C)*] assertion likely was negligent because that assertion was entirely incorrect.[16] In fact, the Union could lawfully have enforced the agreements and demanded that the Employers replace all direct hires with applicants from the Union's referral

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opinion of United States District Court for Southern District of Ohio; See also, Int'l Brotherhood of Electrical Workers, Local 48 (Oregon-Columbia), 342 NLRB 101 (2004) (union's referral of registrants out of order because of failure to monitor its own books was unlawful "gross negligence").

[15] See e.g., Curtis v. United Transportation Union, 700 F.2d 457, 458-459 (8th Cir. 1983), reversing unpublished opinion of United States District Court for the Eastern District of Arkansas (union business agent cannot be held to same standard of professional conduct as an attorney).

[16] See, Laborers Local 107 v. Kunco, Inc., 472 F.2d 456, 458 (8th Cir. 1973). Section 14(b) of the Act was passed to make certain that Section 8(a)(3) could not be used to authorize union security agreements in right-to-work states. However, Section 14(b) merely empowers states to prohibit agreements requiring membership in a labor organization as a condition of employment. A hiring hall arrangement which, though exclusive, does not require union membership is not a union security agreement that may be outlawed in right-to-work states.

lists.[17] However, despite the fact that the Union may have been inept in its understanding of and research into the relevant law, we conclude that the Union's reliance upon the Employer's incorrect assessment of the law amounted to "mere" negligence or ineptitude, not gross negligence. Therefore, the Union did not breach its duty of fair representation and did not violate Section 8(b)(1)(A).

[17] See, Birmingham Country Club, 199 NLRB 854, 856-857 (1972) (Union had right to enforce terms of hiring hall agreement by seeking discharge of non-referred employees); Painters Local 487 (American Coatings), 226 NLRB 299, 300-301 (1975) (same).

Accordingly, the instant charges should be dismissed, absent withdrawal.

B.J.K.